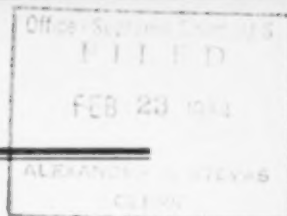


NO. 83-1224



IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVERTIS-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS.

On Appeal from the Superior Court of New Jersey,
Appellate Division

**MOTION OF APPELLEE NEW JERSEY STATE
BOARD OF PHARMACY TO DISMISS OR AFFIRM**

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The appellee New Jersey State Board of Pharmacy respectfully moves pursuant to Rule 16.1(b) and (d) to dismiss this appeal or for summary affirmance of the judgment of the Appellate Division of the Superior Court of New Jersey on the grounds that the decision below was manifestly correct and does not present substantial constitutional questions in need of further argument.

Counter-Statement of the Case

Appellant Consumer Value Stores (CVS) would have this Court review by appeal a decision of the Appellate

Division of the Superior Court of New Jersey* which upheld the validity of a statutory ban on one limited mechanism of prescription advertising—discount coupons—as the advertising of an unlawful activity, “rebating”. The Appellate Division found that CVS had patently failed to demonstrate that the governing statute N.J.S.A. 45:14-12(f) was unconstitutional and further concluded that “price control legislation in businesses affected with a public interest, such as the pharmacy business” is sustainable “as an exercise of the police power to curtail unfair competition and unfair sales practices.” *In the Matter of the Board of Pharmacy Decision to Prohibit the Use of Advertisements Containing Coupons*, 191 N.J. Super. 7, — A. 2d — (App. Div. 1983) (A. 4).

The Appellate Division decision unanimously upheld a declaratory ruling of the New Jersey State Board of Pharmacy which prohibited the issuance and redemption of pharmacy prescription coupons as an unlawful rebate (A. 17; A. 23; A. 8-A. 10). The decision of the Board permitted the continued advertising of prescription drug prices while outlawing this limited mechanism—discount coupons—as an unfair competitive device.

In seeking further review of the decision, appellant fails to recognize that some limitations on advertising are constitutionally permissible, and the New Jersey Legislature, having made a judgment that the activity of “rebating” is harmful to the public in the context of the highly regulated profession of pharmacy, could properly

* Review of the judgment sought in the Supreme Court of the State of New Jersey by CVS has been twice denied. A petition for certification of the judgment of the Appellate Division was denied and the appeal dismissed on October 24, 1983 (A. 3). Similarly, a motion for reconsideration of the denial of the petition for certification was denied on January 17, 1984 (AA. 1).

proscribe the advertising of same. For these reasons, the decision below is manifestly correct and should be summarily affirmed or, in the alternative, as no substantial federal question has been presented, the appeal should be dismissed.

ARGUMENT

The Appellate Division of the Superior Court of New Jersey properly held that a prohibition of prescription discount coupons (rebates) is a permissible exercise of the police power to curtail unfair sales practices and unfair competition and that government may ban commercial advertising of an unlawful activity and no substantial constitutional issue having been presented, this Court should dismiss the appeal or summarily affirm the ruling below.

Despite appellant's efforts to cast the decision below as in substantial conflict with the precedents of this Court and to present a "dire need" for this Court to define the scope of the "unlawful activity exception" to the First Amendment, the Appellate Division's opinion is self-evidently in concert with this Court's decisions in the area of commercial speech.

The challenged declaratory ruling of the Board and the underlying statutory prohibition ultimately rest on the simple proposition that under the precedents of this Court regarding commercial speech by professionals, the State may ban the advertising of an illegal activity or misleading advertising. Since the ban on prescription discount coupons fits squarely within the exceptions set forth in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and its progeny,

which recognize the State's continued ability to regulate commercial speech which is false, misleading, deceptive or which proposes a transaction illegal in itself, *id.* at 772, the decision of the New Jersey court upholding the declaratory ruling was clearly correct.

Initially it should be noted that in examining the extent of protection afforded by the First Amendment to commercial speech, this Court held in the landmark case of *Virginia Pharmacy Board* that a state could not impose a total ban on all advertising of the prices of prescription drugs. *Id.* at 13-25. The entire focus of the Court however was on the absolute ban on advertising; the Court was not presented with a legislative determination as in the instant case that a particular activity, "rebating"* was harmful to the public**.

The Court in *Virginia Pharmacy Board* specified that state regulation of commercial speech remains permissible. In this regard, the decision amplified:

* CVS claims that a distinction between prescription drug advertising and "coupons" is peculiar to the State of New Jersey (Ab7). It is important to note, however, that the New Jersey prohibition is against the activity of "rebating"; "coupons" are only proscribed as incidental to that activity. Furthermore, at least two of the cases cited by CVS for the proposition that coupons are part of the protected commercial advertising scheme did not involve discount coupons at all. See *Texas State Board of Pharmacy v. Gibson's Discount Center, Inc.*, 541 S.W. 2d 884 (Tex. Cir. App. 1976) and *Mississippi State Board of Pharmacy v. Steele*, 317 So. 2d 33 (1975).

** Support for the view that the New Jersey legislature has determined to leave the protection of the anti-rebate provision intact can be found in its repeal of a general proscription against prescription drug advertising found in N.J.S.A. 45:14-12(c) following the *Virginia Pharmacy Board* decision while preserving the anti-rebate provision of the same statute, N.J.S.A. 45:14-12(f). (L. 1977, c. 240, §2).

Untruthful speech, commercial or otherwise has never been protected for its own sake [citations omitted]. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state's dealing effectively with this problem. The First Amendment as we construe it today, does not prohibit the state from insuring that the stream of commercial information flows cleanly as well as freely [425 U.S. at 771].

Similarly, cases decided since *Virginia Pharmacy Board* have found it constitutionally permissible to limit commercial speech to protect against possible misleading advertising or to safeguard the free flow of information. See, for example, *Friedman v. Rogers*, 440 U.S. 1, reh. denied 441 U.S. 917 (1979) in which this Court held that a prohibition on the use of tradenames in the practice of optometry is a constitutionally permissible limitation on commercial speech to protect against possible misleading or deceptive advertising practices.

In addition to recognizing a state's continued ability to regulate commercial speech which is false, misleading or deceptive, the Supreme Court in *Virginia Pharmacy Board* pointed out that the advertisements there were not proposing a transaction which was illegal in itself, *Virginia Board*, 425 U.S. at 772. Thus, the Court kept intact its previous decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, reh. denied 414 U.S. 881 (1973). In that case this Court held that a municipal ordinance as construed to forbid a newspaper from printing "help wanted" advertisements under sex-designated columns for certain job opportunities does not violate First Amendment rights of the press. The Court viewed the sex-designated columns as further-

ing the advertisers' illegal sex preference in hiring decisions and thus an impermissible "aid" to an employment practice declared unlawful under the Pittsburgh ordinance. Significantly, the Court opined:

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. [*Id.* at 389].

See also *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). (State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity). As later interpreted in *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 563 (1980), and as the court below recognized, it is incumbent on the petitioner to establish as a threshold that the commercial speech at issue "at least must concern lawful activity and not be misleading," to come within the protection of the First Amendment (A. 6). When a communication is found to be misleading, a state need not assert a substantial interest in order to prohibit it. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

Against this background we come to a consideration of the facts of the instant matter which involves a statute prohibiting one limited mechanism of advertising activity deemed inimical to the public interest by the Legislature—that is rebates—by the particular method of rebating at issue, discount prescription coupons. In New Jersey the practice of pharmacy has been found to vitally affect the public health and welfare and thus be subject to regulation. *Supermarkets General Corp. v. Sills*, 93 N.J. Super.

326, 225 A.2d 728 (Ch. Div. 1966). The Legislature, in establishing such regulation, determined that the public interest mandated a prohibition on certain activities including the practice at issue here:

The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. . . . [N.J.S.A. 45:14-12(f)].

That determination appropriately could have been predicated on the Legislature's belief that rebates were inimical to the public interest because rebating activities by licensed pharmacists would either foster unfair competition or foment price wars.* Price wars are antithetical to the public interest in that they create chaotic economic conditions in which it is inevitable that some competitor pharmacies will be eliminated altogether, thus reducing the availability of vital pharmacy services and prescrip-

*Support for the view that the Legislature did wish to eliminate unfair competition and prevent price wars in the pharmaceutical industry can be found in the subsequently enacted New Jersey statute relating specifically to advertising of the price of prescription drugs. N.J.S.A. 24:6E-2 proscribes the advertising of prescription drugs for a price lower than the acquisition cost as follows:

. . . The Director of the Division of Consumer Affairs shall promulgate rules and regulations governing the advertising of prescription drugs. Such rules shall include . . . the following . . . (3) provisions prohibiting the advertising for sale of a prescription drug at a retail price below the acquisition cost of the drug to the retail seller.

tion drugs to the public. See *Fried v. Kerwick*, 34 N.J. 68, 167 A.2d 380 (1961).

The Legislature may also have acted upon its belief that prescription coupons are misleading. Thus while coupons purport to give consumers \$1 off the price of a prescription drug, the coupon does not indicate the purchase price. As a result, the customer does not know whether the purchase price represents the manufacturer's suggested retail price or a price formulated by CVS or a price prevalent among pharmacy store competitors. Nor is the consumer informed as to when the purchase price attained its present level and for how long it will remain at current levels to facilitate a comparison by the consumer of the purchase price at a given point in time with other time periods. Because the inducement of a \$1 rebate in itself conveys no meaningful information to the consumer which enables him to make well-informed economic decisions and because all other price information is withheld, the public is misled as to the true value of the prescription drug purchasing transaction.

Independent of the fact that no meaningful price information is conveyed by this form of advertising, prescription coupons, as distinct from coupons distributed in the sale of other products, have a special potential for misleading the public.² Because the drugs are available only on the authorization of a physician, they are not available to be purchased whenever desired by a consumer. The public generally does not buy a large variety of drugs on a recurring basis as they might purchase such products as soap or shampoo and, therefore, the public is not familiar with the price of prescription drugs over a period of time. The lack of familiarity with prescription drug prices deprives the consumer of the ability to know the pricing context in which the rebate is offered, as compared with

the knowledge of the public through experience with the price of soap or shampoo so that the consumer can readily judge the value of a coupon rebate.

It is apparent therefore that as a result of the Board's declaratory ruling no restraint has been imposed on the "free flow of information" regarding prescription drug prices. Rather, as was the case in *Friedman v. Rogers*, *supra*, the State's prohibition of this limited advertising activity does not deny the public any price specific information, but prevents the advertising of price related, but ultimately meaningless information to the consumer. Prohibition of the use of these coupons is permissible, since the coupons constitute "a form of commercial speech that has no intrinsic meaning" with "possibilities for deception [that] are numerous" *Id.* at 12-13.

Nor is there merit to appellant's bald claim, notably not briefed for the Court, that the anti-rebate statute (N.J.S.A. 45:14-12(f)) is unconstitutional as a denial of equal protection. Contrary to appellant's assertion, the Senior Citizen exemption to the anti-rebate provision is a permissible exercise of the legislative judgment. Notwithstanding that the Legislature intended to prevent price wars or eliminate unfair competition by the enactment of the anti-rebate provision, they could still determine to allow an exemption to one limited group. See *New Orleans v. Dukes*, 472 U.S. 297 (1976); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The Legislature may have perceived no need to extend the ban on rebates and premiums to sales of prescription drugs to those 62 years of age or older because the lawmakers saw no threat to the economic viability of pharmacies posed by discounts utilized by this portion of the population.

It is entirely proper for the Legislature to determine to deal with a perceived evil as it sees fit, one aspect at a time and it may adopt a policy that only partially ameliorates a perceived evil. See *New Orleans v. Dukes*, *supra*, at 303. The Legislature appropriately may have determined that on balance, a small portion of the population (in this instance Senior Citizens) could qualify for an exemption.

In summary, then, this case presents the simple question of whether the Legislature can act to prohibit activity deemed inimical to the public interest—the distribution of rebates for prescription drugs. Because this Court has repeatedly held that commercial speech which is misleading, deceptive or proposes a transaction illegal in itself may be regulated and because N.J.S.A. 45:14-12(f) is not a prohibition which blocks the flow of information enabling consumers to make considered commercial decisions, but rather ensures the free flow of information, the Appellate Division of the Superior Court of New Jersey properly upheld the Board's declaratory ruling and no purpose would be served by further review. As the ruling below was clearly correct and the present appeal presents no substantial constitutional question, the appeal should be dismissed or the ruling below summarily affirmed.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or in the alternative the judgment of the Superior Court of New Jersey, Appellate Division affirmed.

Respectfully submitted,

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Dated: February 21, 1984

* Member of the Supreme Court Bar.

APPENDIX A

Order of the Supreme Court of New Jersey

SUPREME COURT NEW JERSEY

M-410 September Term 1983

21,598

**IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVER-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS, etc.**

This matter having been duly presented to the Court, it is ordered that the motion of Consumer Value Store (CVS) for reconsideration of denial of petition for certification is denied.

Witness, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 17th day of January, 1984.

STEPHEN W. TOWNSEND
Clerk

Filed: Supreme Court of New Jersey
January 18, 1984